

Claim No. _____

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

BETWEEN:

BURFORD CAPITAL LIMITED

Claimant

- and -

LONDON STOCK EXCHANGE GROUP PLC

Defendant

**FIRST WITNESS STATEMENT OF
RICHARD CHARLES EAST**

I, **RICHARD CHARLES EAST**, of 90 High Holborn, London WC1V 6LJ, will say as follows:

1. I am a solicitor and a senior partner at the firm Quinn Emanuel Urquhart & Sullivan UK LLP of the above address. I have the conduct of this matter on behalf of the Claimant, ("**Burford**") and I am duly authorised to make this witness statement on its behalf.
2. Except where I state otherwise, the facts and matters set out in this witness statement are within my own knowledge and are true. Where the facts and matters are not within my own knowledge, they are based on instructions, documents and information supplied to me by Burford and are true to the best of my knowledge, information and

belief. The accompanying exhibit “**RCE1**” contains documents to which I refer in this witness statement. References in this witness statement to the exhibit take the form [RCE1/page number].

3. I make this statement in support of Burford’s claim for *Norwich Pharmacal* relief against the Defendant, which owns and operates the London Stock Exchange (“LSE”).
4. I set out below a brief summary of Burford’s claim, which I develop further in the remainder of this witness statement.
5. Burford is a publicly traded company, incorporated in Guernsey, whose shares are listed on AIM, a sub-market of the LSE. Between 5 and 7 August 2019, Burford’s share price saw a significant decline from £13.81, at the close of trading on 5 August 2019, to £6.05, at the close on 7 August 2019. The effect of this decline in Burford’s share price was to reduce Burford’s total market value by almost £1.7 billion.
6. This share price decline coincided with a short selling attack on Burford’s shares carried out by Muddy Waters Capital LLC (“**Muddy Waters**”), a US-based investment fund.
7. At the close of trading on 5 August 2019, Burford’s shares were priced at £13.81 and Muddy Waters had built up a significant, but at the time undisclosed, short position amounting to 0.71% of Burford’s share capital. Rather than publicly disclose this position to the market (as required under legislation governing short selling), at 1:30pm on 6 August 2019, Muddy Waters tweeted that it would be announcing a new short position the following day, but without identifying the target. Despite this lack of transparency, Burford’s share price fell in the afternoon of 6 August 2019 to a closing price of £11.21. At 8:53am the next morning, Muddy Waters posted a further tweet which identified Burford as the subject of its short position, albeit without disclosing that Muddy Waters had already significantly reduced the size of that position. Burford’s share price continued to fall during 7 August 2019, closing at £6.05.

8. Burford has analysed publicly available trading data for its shares over 6 and 7 August 2019. As identified in the report of Professor Mitts (“**Mitts Report**”, a copy of which is exhibited at **RCE1/1**) and described further below, there are strong grounds to consider that a large proportion of the decline in Burford’s share price was the consequence of unlawful trading activity known as “spoofing” and “layering”. This activity, which involves the placing of large numbers of orders for shares of a given issuer, without any genuine intention of such orders ever being executed, for the purpose of moving the share price, amounts to unlawful market manipulation contrary to Article 15 of the Market Abuse Regulation (EU) No 596/2014 (“**MAR**”), section 90 of the Financial Services Act 2012 (“**FSA**”), section 2 of the Fraud Act, as well as the common-law torts of deceit. In the circumstances of this case, there is also good reason to consider that the traders involved in such market manipulation were acting in concert with each other and/or Muddy Waters, thereby also committing the tort of conspiracy to injure by unlawful means.
9. It is not possible to identify, on the basis of the publicly available trading data, which market participants were involved in the unlawful trading. Burford has, therefore, issued this Part 8 Claim against the Defendant in order to obtain the identity of the individuals and entities that were placing orders, and the individuals and entities on whose behalf the orders were being placed, for Burford’s shares on any of the Defendant’s trading platforms, together with further information in relation to such orders to enable Burford to differentiate between legitimate trading and market abuse.

The Parties

10. The Claimant, Burford, carries on business as a finance provider to the legal market.
11. The Defendant, London Stock Exchange Group Plc, is incorporated in England & Wales. It owns and operates the LSE, which is the principal stock exchange in the United Kingdom.

The LSE

12. The LSE hosts two equity markets: the Main Market and AIM. AIM is a regulated market and is subject to UK and European legislation governing share trading.
13. Also, the Defendant is the majority owner of LSE Turquoise. This is a multi-lateral trading facility platform that allows trading in equities and derivatives on a range of European markets, including AIM stocks.
14. Trading directly on AIM and trading through LSE Turquoise can be conducted through “lit” orders – in which the order is published to other market participants and remains visible until executed or cancelled – and “dark” orders, which are not displayed until after they are executed.
15. While AIM-listed shares may also be traded on other platforms, or directly between market participants as “over the counter” trades, the majority of trading in an AIM listed stock will usually take place on the exchange. Moreover in the context of market manipulation – which, as I explain below, involves the placing of orders that are not intended to execute, for the purpose of moving the price of a share – it is necessary for the activity in question to be visible to other market participants, as market manipulation relies upon the reaction of other participants to the orders in question.
16. It is thus likely that any market manipulation in Burford’s shares will have been carried out through “lit” orders submitted to the LSE and LSE Turquoise. On 6 August 2019, 97.47% of the order book activity for Burford’s shares took place through the LSE, and 2.53% took place through LSE Turquoise. On 7 August 2019, 96.48% of the order book activity for Burford’s shares took place through the LSE, and 3.52% took place through LSE Turquoise.
17. Trading on the LSE can take place either through a broker or through “direct market access” (“DMA”). Traders with DMA can enter orders directly on the LSE order books without going through a broker.
18. While the majority of traders still conduct trades through brokers, DMA is more

common in “high frequency” trading (“HFT”). In HFT, a share may be held for only a matter of nanoseconds before being resold, with the trader seeking to profit from short-term fluctuations in the price. Most HFT is conducted by computers executing a programmed ‘strategy’: while the strategy is set by humans, the subsequent trading itself may be entirely automatic. This is known as “algorithmic trading”.

19. As I observe below, the activity identified as manipulative in the Mitts Report involves orders for Burford shares being submitted, almost immediately cancelled, and then replaced by new orders at slightly different prices, sometimes within nanoseconds. This suggests that at least some of the manipulative activity was being executed through HFT funds executing algorithmic strategies. This in turn makes it likely that at least some of the manipulation took place via traders using DMA.
20. Almost every transaction on the LSE is conducted electronically. As I outline below, the Defendant is statutorily required to hold certain information pertaining to the information that passes through the exchange, including the information sought by way of these proceedings.

Short Selling

21. Short selling, or a short position, is a reference to an investment strategy by which an investor seeks to make a profit from a fall in the price of a share by selling shares which the investor does not own. A short position may be covered or naked. In a covered short position, the investor borrows shares from an existing shareholder. The investor sells the shares in the hope that he will be able to buy them back at a lower price before he is required to return the shares to their owner: the profit comes from the difference between the amount for which the shares are sold, and the cost of buying them back. In a naked short, rather than borrow shares the investor simply contracts to sell shares without actually possessing them, with the intention that he can acquire the shares at a lower cost in the market before he is required to settle the trade. Naked shorting is prohibited, in respect of shares primarily listed within the EU, under Article 12 of the EU Short Selling Regulation 2012 (“EUSSR”).¹

¹ Regulation (EU) No 236/2012.

22. The greater the fall in price in a share after a short seller has taken a short position, the greater the profit from the position. Conversely, if the share price rises, the investor will suffer a loss. An investor taking a short position in a company, therefore, has a direct financial interest in the share price falling prior to his closing out the position. Abusive short selling (or a short attack) is a targeted and coordinated attack by one or several short sellers that involves taking a short position in a company and attempting to drive down the share price, for example through the release of negative information with respect to the company.
23. Pursuant to Articles 6 and 9 of the EUSSR, any net short position involving more than 0.5% of an issuer's shares must be publicly notified by 3:30pm on the trading day after this threshold was reached, with a further notification each time the position changes by 0.1% or more of the issuer's shares until it falls below 0.5%.
24. The purpose of such notifications is explained in Recital (7) to the EUSSR which provides: *"Enhanced transparency relating to significant net short positions in specific financial instruments is likely to be of benefit to both the regulatory and market participants...positions should be publically disclosed to the market in order to provide useful information to other market participants about significant individual short positions in shares"*.
25. The procedure for notifying net short positions is by sending a share notification form to the FCA by email.² Notified net short positions are published by the FCA in their daily register of net short positions, available online. I attach an example of the daily register downloaded on 17 September 2019, sorted by date.³ This lists net short positions taken up to 16 September 2019, and shows that the FCA updates the register promptly. Technical advice published by the European Shares and Markets Authority also makes clear that regulators are required to publish notifications on the day they are received.⁴

² RCE1/40.

³ RCE1/44.

⁴ RCE1/61 [refer to internal pages 54-55].

Market Manipulation

26. As I describe further below, Professor Mitts' analysis provides clear evidence that trading in Burford's shares over the period 6 - 7 August 2019 was significantly affected by a form of market manipulation known as "layering" and "spoofing", with the effect of artificially driving down the price of Burford's shares.

27. As described by Professor Mitts:

"[6] Two types of behavior which send a false pricing signal to the market are spoofing and layering [...].

[7] While the precise use of these terms can vary, spoofing generally refers to placing a high volume of orders at a price equal to or better than the national best-bid-best-offer (NBBO) and subsequently cancelling these orders to move the price in a given direction without taking on any economic exposure. [...]

[8] Layering is similar to spoofing except that instead of placing and cancelling a high volume of orders at the NBBO the manipulator places these orders deeper in the order book, i.e., at prices above the best offer or below the best bid. [...]

[9] A high volume of orders deeper in the limit order book can move the price of the stock for several reasons. First, volume in the limit order book suggests that some market participant(s) may possess information as to the future direction of the share price. Even if the probability that the trader possess information is low, market makers will adjust the price up or down to some extent. [...]

[11] Second, a large volume of sell (or buy) orders above the best offer (or bid) creates a "wall" of supply (or demand) which may prevent the price from rising or falling further. [...]

[Fn 7] Moreover, by repeatedly placing and cancelling these orders within a very short time, the manipulator can maintain the downward (or upward) pressure on the price. [...]"

28. In *Financial Conduct Authority v. Da Vinci Invest Ltd.* [2015] EWHC 2401 (Ch), the High Court used the following description of layering and spoofing, at [22]:

"'layering' consists of the practice of entering relatively large orders on one side of an exchange's ... electronic order book ... without a genuine intention that the orders will be executed: the orders are placed at prices which are (so the person placing them believes) unlikely to attract counterparties, while they nevertheless achieve his objective of moving the price of the relevant

share as the market adjusts to the fact that there has been an apparent shift in the balance of supply and demand. The movement is then followed by the execution of a trade on the opposite side of the order book which takes advantage of, and profits from, that movement. This trade is in turn followed by a rapid deletion of the large orders which had been entered for the purpose of causing the movement in price, and by repetition of the behaviour in reverse on the other side of the order book. In other words, a person engaged in layering attempts to move the price up in order to benefit from a sale at a high price, then attempts to move it down in order to buy again, but at a lower price, and typically repeats the process several times”.

The Judge went on to note that *“From that description it will be apparent that the term 'layering' refers to the placing of multiple orders that are designed not to trade on one side of the order book, and the term 'spoofing' refers to the fact that the placing of such orders creates a false impression as to the person's true trading intentions.”* I note that this description is equally applicable to the layering and spoofing identified by Professor Mitts in this case.

29. In *Da Vinci Invest*, the High Court held that the layering and spoofing amounted to market abuse contrary to section 118(5) of the Financial Services and Markets Act 2000 (“FSMA”). This provision has since been repealed and replaced by the MAR. The MAR expressly recognises layering and spoofing as conduct indicative of market manipulation:

29.1 Article 15 MAR provides that *“A person shall not engage in or attempt to engage in market manipulation.”*

29.2 “Market manipulation” is defined at Article 12 MAR to include the following:

“1. For the purposes of this Regulation, market manipulation shall comprise the following activities:

(a) entering into a transaction, placing an order to trade or any other behaviour which:

(i) gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of, a financial instrument [...];

[...]

unless the person entering into a transaction, placing an order to trade or engaging in any other behaviour establishes that such transaction, order or behaviour have been carried out for legitimate reasons, and conform with an accepted market practice as established in accordance with Article 13;

- (b) entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several financial instruments[...], which employs a fictitious device or any other form of deception or contrivance;*

[...]

- 2. The following behaviour shall, inter alia, be considered as market manipulation:*

[...]

- (c) the placing of orders to a trading venue, including any cancellation or modification thereof, by any available means of trading, including by electronic means, such as algorithmic and high-frequency trading strategies, and which has one of the effects referred to in paragraph 1(a) or (b), by:*

[...]

(iii) creating or being likely to create a false or misleading signal about the supply of, or demand for, or price of, a financial instrument, in particular by entering orders to initiate or exacerbate a trend”.

- 29.3 Annex 1 to the MAR provides a non-exhaustive list of indicators of market manipulation. This includes, at Indicator A(f):

“the extent to which orders to trade given change the representation of the best bid or offer prices in a financial instrument, [...], or more generally the representation of the order book available to market participants, and are removed before they are executed”

- 29.4 Paragraphs 5-6 of Section 1 of Annex II of the Commission Delegated Regulation (EU) 2016/522, supplementing the MAR, provides further detail on practices amounting to market manipulation:

“5. Practices specifying Indicator A(e) of Annex I of [the MAR]:

[...]

- (e) Submitting multiple or large orders to trade often away from the touch on one side of the order book in order to execute a*

trade on the other side of the order book. Once the trade has taken place, the orders with no intention to be executed shall be removed — usually known as layering and spoofing. This practice may also be illustrated by the indicator set out in Point 4(f)(i)
[...]

6. *Practices specifying Indicator A(f) of Annex I of [the MAR]:*

(a) *Entering of orders which are withdrawn before execution, thus having the effect, or which are likely to have the effect, of giving a misleading impression that there is demand for or supply of a financial instrument, a related spot commodity contract, or an auctioned product based on emission allowances at that price — usually known as ‘placing orders with no intention of executing them’. This practice may also be illustrated by the following additional indicators of market manipulation:*

(i) *orders to trade inserted with such a price that they increase the bid or decrease the offer, and have the effect, or are likely to have the effect, of increasing or decreasing the price of a related financial instrument;*
[...]

(g) *The practice set out in Point 5(e) of this Section, usually known as ‘layering’ and ‘spoofing’”.*

30. Further, in *Navinder Singh Sarao v. The Government of the United States of America* [2016] EWHC 2737 (Admin) - which also concerned conduct prior to the MAR coming into effect – the High Court accepted, in the context of extradition proceedings, that the alleged layering and spoofing would (if proved) be contrary to section 2 of the Fraud Act 2006, section 397 FSMA (now repealed), and section 90 of the FSA, which prohibits conduct which creates a false or misleading impression as to the market in the price or value of any relevant investments, subject to certain knowledge and intention requirements. As held in *Sarao* at [24]-[25]:

“I readily accept that in this market many offers appear on the trading screens which are thereafter cancelled prior to acceptance – for a variety of unexceptionable reasons. To my mind, however, a clear distinction is capable of being drawn between the conduct involved: (1) in placing an offer which at the time it is placed is intended by the offeror to be open for acceptance, though it might subsequently be cancelled prior to acceptance; and (2) in placing an offer which, at the time it is placed, the offeror does not genuinely intend should be accepted. The allegation against the Applicant in the Request is that his conduct fell squarely within category (2) and involved deceiving (or

spoofing) market participants, so creating a false market picture with the intention of creating artificial price movements. Such conduct, if proven here, would constitute an offence under all of the Fraud Act, the FSMA 2000 and the FSA 2012. It thus amply satisfies the test of Dual Criminality.”

Manipulation of Burford’s share price on 6 and 7 August 2019

31. As I describe below, Burford’s shares were subject to a combination of a short selling attack and market manipulation in early August 2019.
32. The FCA publishes a historic register of disclosures of net short positions. This shows that Muddy Waters held net short positions exceeding 0.5% of Burford’s issued shares over the period 5-7 August 2019 as follows:⁵
- 32.1 On 5 August, Muddy Waters’ net short position in BUR was 0.71%
- 32.2 On 6 August, Muddy Waters’ net short position in BUR was 0.57%
- 32.3 On 7 August, Muddy Waters’ net short position in BUR was 0.12%
33. Each disclosure reflects the position as at the close of trading on the day in question. Thus, Muddy Waters had built a significant short position during 5 August 2019, which it gradually reduced over the next two days by purchasing shares (and thereby “covering” its short positions).
34. Unusually, it appears that the FCA’s register did not report Muddy Waters’ short positions in Burford until some days later. On 8 August 2019 Morningstar reported that *“Muddy Waters’s short position in Burford is not present on the FCA’s register.”*⁶ Given the requirement that the FCA publish reported disclosures promptly, this suggests that Muddy Waters was late in submitting the required notification of its short position in Burford to the FCA. Such late disclosure would be a breach of the EUSSR and it is a reasonable inference that Muddy Waters chose to delay notification for the purpose of avoiding alerting the market to its short position in Burford.
35. On 6 August 2019 at 1:30pm (BST), MuddyWatersResearch (@muddywatersre) posted the following tweet (“**6 August Tweet**”):

⁵ The relevant excerpt from this spreadsheet is exhibited at RCE1/190.

⁶ RCE1/191.

“Muddy Waters is now in a blackout period until tomorrow 8 am London time when we will announce a new short position on an accounting fiasco that’s potentially insolvent and possibly facing a liquidity crunch. Investors are bulled up about this company. We’re not”.

A copy of the 6 August Tweet is exhibited at **RCE1/194**.

36. Unlike the notifications required under the EUSSR, the 6 August Tweet did not identify the subject of the short position, its size or when it was first taken.
37. On 7 August 2019 at 08:53:48 (BST), MuddyWatersResearch posted a further tweet (“**7 August Tweet**”):

“Good morning, London. Apologies for the delay. Wanted to check in with counsel. These \$BUR guys sure do have a guilty look to them, don’t they?”

A copy of the 7 August Tweet is exhibited at **RCE1/195**.

38. The 7 August Tweet contained a link to a report (“**Muddy Waters Report**”) which begins with the sentence “*We are short BUR.*” A copy of the Muddy Waters Report is exhibited at **RCE1/196**. The Muddy Waters Report contains allegations that, amongst other things, Burford is “*arguably insolvent*”. It did not, however, disclose the size of Muddy Water’s short position nor when it had been taken.
39. Tens of millions of Burford shares were traded during the period from 6 to 7 August 2019 (“**Relevant Period**”). On 6 August 2019, Burford’s share price closed at £11.21. By 7 August 2019, the closing price for Burford’s shares had fallen to £6.05.
40. On 8 August 2019, Burford issued a public announcement through the LSE’s Regulatory News Service (“**RNS**”) which responded to and rebutted the Muddy Waters Report. A copy of Burford’s response is exhibited at **RCE1/221**. Amongst other things, Burford’s response identified various factual inaccuracies, analytical errors and selective use of information by Muddy Waters. Following publication of

Burford's response, the price of Burford's stock partially recovered, closing at £8.50 on 9 August 2019.

41. As a result of Professor Mitts' analysis, it has become clear that the fall in Burford's share price over the Relevant Period was not solely the result of negative market sentiment resulting from the (unfounded) allegations in the Muddy Waters Report.
42. As shown by Figure 1 of the Mitts Report, Burford's share price – initially just under £14 - began to decline significantly from about 2pm on 6 August 2019, with the decline accelerating until about 3:40pm (at a price of slightly under £11) after which it staged a modest recovery to close at £11.21. The decline began again around the time of the 7 August Tweet (as shown by Figure 2 of the Mitts Report), falling rapidly to a floor of around £4 at about 11:30am, before again recovering slightly to close at £6.05 – a fall of some 60% in two days.
43. The decline in Burford's share price over this period coincides with a series of spikes in the number of sell orders that were created and then cancelled (see Figures 3 and 4). Professor Mitts' analysis of these spikes shows that they involved numerous orders for Burford's shares being submitted and cancelled at prices above the best offer, often within the same millisecond: see Tables 2 and 3. As Professor Mitts explains, these patterns cannot be explained by normal, non-manipulative trading:

"[39] Might these sell orders simply reflect a market reaction to the Muddy Waters tweet? For several reasons, in my opinion that interpretation is implausible. First, sell order cancellations are inconsistent with the market digesting the Muddy Waters tweet. Suppose the market had quickly read the report and reached a view that Burford's stock was overvalued. Market participants would immediately place—but not cancel—sell orders at or below the best offer to maximise their profits before the share price falls further. A wave of panicked selling by investors should not induce the sort of extreme spike in cancellations observed in the data."

[...]

"[41] [...] A microsecond is one millionth of a second, and a large number of cancellations in such a short time suggests the relevant market participants did

not have a genuine intention to sell Burford's stock. Market participants holding a negative view of Burford's stock would not place limit orders at or above the best offer—rather, they would place sell orders below the best offer. [...] A genuine seller would not cancel orders en masse but would allow the orders to be executed.”

44. Professor Mitts' analysis further reveals that the pattern of cancellations seen in orders for Burford shares over the Relevant Period was statistically abnormal, i.e., inconsistent with normal trading behavior. At Figures 9 and 10, Professor Mitts shows the cumulative excess volume of abnormal sell-side order calculations over abnormal buy-side cancellations over the Relevant Period. This measures the imbalance between abnormal sell-side activity (tending to drive the share price down) and abnormal buy-side activity (which would drive it up). As can be seen, there is a significant build up of excess sell-side cancellations on each of the days in question. As Professor Mitts says:

“[48] ... a sell-side imbalance of abnormal order cancellations—i.e., an excess of abnormal sell-side order cancellations relative to abnormal buy-side order cancellations—is inconsistent with legitimate market making. Rather, a large imbalance of abnormal sell-side order cancellations is consistent with manipulative creation of an artificial appearance of excess supply of the stock, which has the effect of inducing market makers to lower their bids, ensuring that the next sell order for Burford's stock will match against a lower bid, i.e., lowering the price.”

45. Professor Mitts has expressed his conclusions on market manipulation in the Mitts Report. I refer to the following excerpts:

“[4(a)] On 6 August, after the posting of the Muddy Waters tweet at 1:30pm BST, the share volume of sell-side order cancellations in Burford's stock skyrocketed, increasing 5-fold over the pre-tweet period. The evidence of spoofing and layering on 7 August is even stronger. I find that 91.77 million sell-side shares were created and cancelled after the Muddy Waters tweet on 7 August [...] 17-fold increase over the pre-tweet period on 6 August.

[4(b)] [...] the surge in sell-side order cancellations was not due either to a flood of sell orders based on information in the market or to rapid movements in price that would lead to more cancellations on both the sell and buy side of the order book [...]

[4(c)] [...] The data show not only that there was a wave of sell order cancellations but also a consistent accumulation of statistically abnormal cancellations. [...] In my opinion, this surge of net sell-side order cancellations is strongly indicative of spoofing and layering.

[4(d)] [...] identify specific patterns of order cancellations which are consistent with intentional manipulation rather than ordinary market making. For example, following the Muddy Waters tweets on 7 August I measure a 29-fold increase in the intensity of sell-side order cancellations preceding buy-side order executions, a clear pattern which indicates intentional manipulation of Burford's share price.

"[4(e)] [...] the decline in the price of Burford's stock on 6 and 7 August was driven by large waves of sell-side order cancellations. [...] The extremely large net sell-side cancellation volume during the minutes when Burford's share price decreased is strong evidence that the price decline on 6 and 7 August 2019 was not induced by ordinary trading in Burford's stock.

46. In addition to demonstrating strong evidence of spoofing and layering intended to manipulate Burford's share price, Professor Mitts' analysis reveals that this manipulation shows signs of being coordinated with Muddy Waters.
47. Specifically, Professor Mitts examined trading activity in the period 8:46-8:51am on 7 August 2019, just before publication of the 7 August Tweet identifying Burford as the target of Muddy Waters' short position.⁷ As Professor Mitts concludes:

"[62] [...] extraordinary episodes of order cancellations in the minutes immediately preceding the Muddy Waters tweet on 7 August. [...]

[63] Over the six-minute period from 8:46am to 8:51am on 7 August there were a total of 432,935 sell-side shares cancelled prior to buy-side executions, of which 383,967 were deep in the limit order book, i.e., above the best offer. [...] the share volume of sell-side cancelled orders prior to buy-side executions

⁷ Professor Mitts chooses this period as, while the 7 August Tweet was not published until 8:53am, it appears that Muddy Waters amended its website to include a tag referring to Burford some minutes before that (first noted in an online message board post at 8:52am), such that it is possible that traders watching Muddy Waters' website would have identified Burford as the subject of the short position at this point.

in the six minutes preceding the Muddy Waters tweet was four times as large as the average in the preceding minutes.

48. Professor Mitts' report thus provides clear evidence that Burford's share price was the subject of deliberate and abusive market manipulation, and it also suggests that such manipulation was coordinated with Muddy Waters.
49. In other words, the dramatic fall in Burford's share price over the Relevant Period did not merely reflect genuine market concerns that the shares had previously been overvalued, but was caused or substantially contributed to by an unlawful attack by market manipulators, apparently acting in concert with a short selling attack by Muddy Waters over the same period.
50. Professor Mitts further explains that the consequence of this manipulation for Burford's share price was not rapidly reversible or correctable:

[13] There are two reasons why Burford's share price is less likely to rapidly reverse direction in response to a manipulative short attack.

[14] The first reason is that the very existence of a short seller report followed by a sharp price decline can weigh heavily on the fundamental value of the company, independent of alleged misstatements. Besides giving rise to costly shareholder litigation, short-seller attacks that seem to be "confirmed" by the market undermine investor confidence in the firm and thereby deter investors from immediately repurchasing large quantities of the stock at its depressed value, which would lead to a price increase. Crucially, this loss of investor confidence may have nothing to do with an alleged misstatement or omission by the issuer.

[15] The second reason is that Burford has a significant retail shareholder base, which tends to place greater weight on the price itself as conveying information about the fundamental value of the company.

51. While the brunt of the loss caused by the immediate decrease in Burford's share price over the Relevant Period will have been suffered by Burford's shareholders (and in particular those who sold their shares at an undervalue during that period), it is obvious that Burford will itself suffer the consequences of a longer-term reduction in

share price and investor confidence.

Burford's claim for Norwich Pharmacal relief against the Defendant

52. While the Mitts Report provides compelling evidence of market manipulation in respect of Burford's shares over the Relevant Period, Burford is at present unable to take any action against those responsible because it does not have access to data that would enable it to identify the perpetrators.
53. In particular, Burford has purchased all of the publicly available trading data for Burford's shares during the Relevant Period, including the direct feed of order book activity. This data contains the complete stream of order messages in the LSE limit order book, and of order flow, trading and Systematic Internaliser quote messages for Burford's stock. This data contains information from both of the relevant exchanges: the LSE and LSE Turquoise. None of this data discloses the identity of the Traders who placed the Orders (either directly or via a broker), nor does it shed light on unlit orders which may shed light on the manipulative intent of certain traders.
54. Nor is such information available from Burford's shareholder register, as this records only actual changes in title to Burford's shares. Thus, the register will not show any activity relating to orders that have been cancelled before they are executed, such as those identified by Professor Mitts as involving layering and spoofing.
55. Burford has therefore brought these proceedings in order to require the Defendant to provide it with such information and so enable Burford to seek redress from those responsible (directly or as conspirators) for the unlawful manipulation of its share price during the Relevant Period, pursuant to the *Norwich Pharmacal* jurisdiction.
56. The principles governing the grant of *Norwich Pharmacal* relief were summarised by Zacaroli J. in *Blue Power Group SARL v. Eni Norge AS* [2018] EWHC 3588 (Ch) at [14] – [18]. In outline, as set out in that passage, an applicant seeking a *Norwich Pharmacal* order must establish that:

- 56.1 there is a “*good arguable case*” that a wrong has been carried out by an ultimate wrongdoer;
- 56.2 the person against whom the order is sought is “*mixed up in so as to have facilitated the wrongdoing*”;
- 56.3 the person against whom the order is sought is able, or is likely to be able, to provide information that will enable action to be taken against the ultimate wrongdoer; and
- 56.4 the making of the order is a “*necessary and proportionate response in all the circumstances*”.

If those conditions are met, the Court has a discretion whether or not to make the order.

Good arguable case that a wrong has been carried out by an ultimate wrongdoer

57. I have summarised above both the law as to market manipulation by layering and spoofing and the evidence of Professor Mitts demonstrating that the declines in Burford’s share price over the Relevant Period were caused or substantially contributed to by such market manipulation in the form of layering and spoofing. Plainly, such layering and spoofing must have taken place through or at the behest of persons (whether individual traders or entities) who submitted, or caused to be submitted, the relevant orders to the market.
58. There is, at the very least, a good arguable case that such persons committed wrongs and are “*ultimate wrongdoers*” for the purposes of the *Norwich Pharmacal* jurisdiction, on the basis that their conduct:
- 58.1 Constituted prohibited market manipulation, contrary to Article 15 MAR;

- 58.2 Constituted conduct which creates a false or misleading impression as to the market in the price or value of any relevant investments, contrary to section 90 FSA;
- 58.3 Involved dishonestly making a false representation as to their intention to trade with the intention of making a gain, contrary to section 2 of the Fraud Act 2006;
- 58.4 Amounted to the common law tort of deceit, in that submitting orders that did not reflect any genuine intention to trade amounted to making representations to the market that they knew to be untrue or were reckless as to the truth of;
- 58.5 Was coordinated with other traders and/or others having an interest in Burford's stock price falling over the Relevant Period, and which has caused loss and damage to Burford, so as to amount to the tort of conspiracy by means of the unlawful conduct identified above.
59. It does not matter, for the purposes of the *Norwich Pharmacal* jurisdiction, that the wrongs identified above involve a combination of torts, statutory wrongs, regulatory and criminal offences. It is recognised that the *Norwich Pharmacal* jurisdiction is not limited to obtaining information for the purposes of enabling a civil claim to be brought, but can be invoked wherever a victim requires information for the purposes of obtaining legitimate redress, including in aid of criminal proceedings.
60. I am instructed that Burford is considering bringing civil proceedings against those responsible for manipulating its share price during the Relevant Period (and any conspirators), in order to claim damages for the loss suffered as a result, an injunction to prevent any repetition of such behavior, and appropriate declarations that such wrongdoing has taken place.
61. In addition, Burford will continue to press for regulatory and criminal action to be taken against such wrongdoers. In this respect, Burford has already asked the FCA to investigate the manipulation of its share price. Burford wishes to assist the FCA to the best of its ability in order to ensure that appropriate regulatory and/or criminal

proceedings are brought against those responsible, whether by way of public or private prosecution. Burford has a legitimate interest in such action being taken in order to ensure the perpetrators are punished for their wrongdoing and to deter future manipulation of its share price. Further, under section 382 of FSMA, the FCA is empowered to apply for a restitution order requiring those traders found to have profited from market manipulation to disgorge their profits. Burford, as a person adversely affected by such manipulation, would be entitled to share in the restitution of such profits.

Defendant “mixed up in so as to have facilitated the wrongdoing”

62. Professor Mitts explains at [17] that his analysis was based upon *“the direct feed of order book activity from the London Stock Exchange and LSE Turquoise, the two exchanges which displayed limit orders to buy or sell shares of Burford’s stock”*.
63. Thus, the spoofing and layering found by Professor Mitts represents trading activity that took place on, and was made possible by, the Defendant’s systems. It was through the LSE and LSE Turquoise that the relevant orders were submitted and cancelled and through which market makers and other market participants reacted by adjusting the price of Burford’s shares.
64. It is clear that the Defendant, by providing the market and trading platforms on which the unlawful manipulation of Burford’s share price took place, was mixed up in and facilitated that wrongdoing.

Defendant able to provide information

65. I understand that the Defendant, as an operator of a trading venue, is required to maintain details of each order that is advertised through its trading systems. The specific nature of this obligation is outlined in the Guidance to Rule 2100.3 of the LSE Rulebook (“**Rulebook**”). A copy of the relevant rule and guidance is exhibited at **RCE1/232**. Pursuant to the Rulebook, the Defendant is required to retain all of the information as set out in Commission Delegated Regulation (EU) 2017/580 supplementing Regulation (EU) No 600/2014 (“**Delegated Regulation**”). The

Guidance to Rule 2100.3 of the Rulebook outlines that this information will include details about:

- 65.1 the financial instrument and the order;
 - 65.2 the client of the transmitting firm (i.e., the member or participant who submitted the order); and
 - 65.3 whenever relevant, an identifier for the person or computer algorithm that is responsible for the investment decision in relation to the order (i.e., the client on whose behalf the member or participant submitted the order).
66. The Delegated Regulation (a copy of which is exhibited at **RCE1/234**) contains prescriptive requirements detailing the data that operators of trading venues (such as the Defendant) must keep at their disposal in relation to each order advertised through their systems. Based on my understanding, this information will be held by the Defendant regardless of whether the transaction was executed, and as such will include information as to any order placement, modification, cancellation, rejection and execution.
67. Further, in respect of executed trades, the Defendant is subject to the post-trade reporting requirements in the Markets in Financial Instruments Directive (2014/65/EU) and Markets in Financial Instruments Regulation (Regulation 600/2014) (together, “**MiFID II**”). The associated Commission Delegated Regulation (EU) 2017/587 supplementing Regulation 600/2014 sets out, inter alia, the post-trade reporting obligations for trading venues and other platforms at Annex I, Table 3. A copy of Commission Delegated Regulation (EU) 2017/587 is exhibited at **RCE1/253**. In particular, the Defendant will hold the following information for its post-trade reports, listed by field identifier:
- 67.1 Trading date and time;
 - 67.2 Instrument identification code;

- 67.3 Price;
 - 67.4 Price currency;
 - 67.5 Quantity;
 - 67.6 Venue of execution;
 - 67.7 Publication date and time;
 - 67.8 Venue of publication; and
 - 67.9 Transaction identification code.
68. Table 3 contains information on the description and details to be published for each of the above-mentioned field identifiers for the purpose of post-trade transparency.
69. Thus, the Defendant will have in its possession identifying information about the member or participant who submitted the order for Burford's stock, and information about the client on whose behalf the member or participant submitted the order for Burford's stock. It will also have detailed information on any trades that executed. We understand that the Defendant will have this information in its possession or under its control in respect of the buy and sell order events submitted to any of the Defendant's trading platforms, including the LSE and also likely LSE Turquoise. Burford reserves the right to amend its application if it transpires that the Respondent does not have this information in its possession or under its control in relation to LSE Turquoise.
70. I address below the extent to which Burford requires such information below for the purposes of enabling it to obtain redress against those responsible for manipulating its share price.

Order necessary and proportionate response in all the circumstances

71. Burford has considered what additional information it requires at this stage in order to be able to seek redress from the perpetrators responsible for the unlawful manipulation of its share price during the Relevant Period. In doing so, Burford has taken into account the need to be able to distinguish between legitimate and abusive market activity.
72. In particular, Burford has considered with Professor Mitts whether it is possible, on the basis of the information already in Burford's possession, to distinguish between clearly abusive market activity on the one hand, and legitimate market activity on the other, so as to allow Burford to seek information only in relation to the former.
73. Regrettably, this does not appear to be possible. While it is possible, on the basis of Professor Mitts' analysis, to identify certain orders as being likely to involve layering and spoofing, it does not follow that the remaining activity is all legitimate.
- 73.1 For example, while a hallmark of layering and spoofing is that orders are submitted with the intention of being cancelled before they are executed, inevitably, given the volume in question, some will be executed.
- 73.2 Thus, excluding executed orders from the information requested will not give a complete picture of the market manipulation or of the associated trading, either by the manipulators or their co-conspirators, which the manipulation was carried out to assist.
74. Conversely, the fact that an order is cancelled does not mean that it was part of a layering and spoofing strategy. There are legitimate reasons why a market participant may cancel an order. In many cases, it will be necessary to look at the pattern of orders submitted by a given participant (or combination of participants) in order to determine whether a cancellation was a one-off event having a legitimate explanation, or part of a strategy of market manipulation.
75. In order to be able to identify those responsible for unlawful manipulation of

Burford's share price (including conspirators for whose benefit such manipulation was undertaken), and to distinguish such persons from those engaged in legitimate trading, Burford considers that it requires the following information in relation to the Relevant Period:

75.1 A complete list of all the buy and sell order events submitted in connection with Burford's shares to any of the LSE's trading platforms during the Relevant Period, including, but not limited to, order creation messages, deletion messages, update messages, execution messages, trade messages, and any other messages ("**Share Order Event**").

75.2 In respect of each Share Order Event, the following data ("**Order Event Data**"):

- (1) The names of the natural or legal persons, or third party entities (including but not limited to natural persons, brokers, banks and other financial institutions) which submitted the Share Order Event, including the names of the members or participants of the trading venue who submitted the Share Order Event to the trading venue, and the names of the client on whose behalf the member or participant of the trading venue submitted the Share Order Event to the trading venue ("**Traders**");
- (2) The precise timestamp, to nanosecond accuracy (if available), that the Share Order Event was received by the LSE;
- (3) The type of message, e.g., new order, deletion, update price/quantity, order execution, trade, etc.
- (4) The order ID to which the Share Order Event applies;
- (5) The parent order ID to which the Share Order Event applies, if any;
- (6) Instrument identification code;
- (7) Price;
- (8) Price currency;

- (9) Quantity;
- (10) Venue of execution, if execution message;
- (11) Publication date and time;
- (12) Venue of publication;
- (13) Transaction identification code.

75.3 For each of the Traders, the Trader's contact information, including any email addresses, phone numbers and postal addresses within the control of the LSE,

("Information Sought").

- 76. In the *Da Vinci Invest* case, the Judge held that there was a joint enterprise among various traders to manipulate the market on the basis that the trading data showed a pattern of coordinated behavior and that orders which were cancelled in a coordinated fashion by a number of different traders was evidence of a joint enterprise to manipulate the market. This shows the importance of having access to the Information Sought in respect of the full order book, as otherwise patterns of market manipulation involving coordination between multiple participants may not be apparent.
- 77. While the Information Sought will involve the Defendant disclosing details of Share Orders and Traders who, upon analysis, may prove to have had no involvement in market manipulation, such disclosure is necessary precisely in order that Burford can identify such Traders and Share Orders as innocent and so avoid taking any action against them.
- 78. Further, I do not consider that there are any reasons of privacy or confidentiality for the Court to refuse ordering disclosure of the Information Sought. Self-evidently, any person submitting a genuine order to buy or sell Burford shares is either already a shareholder in Burford, or wishes to become one. That information would ultimately become available to Burford through its shareholder register.

79. It follows that any person who was party to a sale or purchase of Burford shares during the Relevant Period, or who owned Burford shares throughout that period, cannot have any expectation of privacy as to that fact vis-à-vis Burford. Equally, any person who submitted genuine offers to buy Burford shares - i.e., who submitted such offers with the intention that they be executed – must have accepted the possibility of Burford being entitled to know their identity.
80. In the absence of any reasonable expectation of privacy as to their identity on the part of those involved in genuine trading in Burford shares, there is no compelling reason against the disclosure of the rest of the Information Sought, much of which (in anonymised form) is already publicly available.
81. In circumstances where Burford wishes to obtain redress against wrongdoers who, in the course of two days, wiped almost £1.7 billion off Burford's shares and by their actions have caused continuing damage to Burford's standing among investors, it is my respectful submission that an Order requiring the Defendant to provide the Information Sought is necessary and appropriate.

Position of the Defendant

82. On 20 September 2019, I wrote to the Defendant on Burford's behalf, addressing my letter to the General Counsel. A copy of that letter, sent via email, is exhibited at **RCE1/277**.
83. The 20 September 2019 letter was also sent by registered post to the LSE's address in London on 23 September 2019. A copy of the delivery confirmation is exhibited at **RCE1/285**.
84. As set out in the 20 September 2019 letter, Burford sought disclosure of the information sought in the present proceedings for the purpose of contacting the manipulators to commence and pursue legal proceedings (including effecting legal service).
85. On 25 September 2019, I received an email from Francesco Rochlitzer on behalf of

the Defendant confirming receipt of the 20 September 2019 letter, which stated that the Defendant required more time to respond. A copy of this email is exhibited at **RCE1/287**.


86. Given the seriousness of the matters raised by my firm's letter of 20 September 2019, and the obvious likelihood that the LSE would require a court order in order to disclose the requested Information, Burford decided to move immediately forward to issue the *Norwich Pharmacal* proceedings. This reflects Burford's desire to obtain the information sought as soon as possible, so that Burford may identify and seek redress against any traders and co-conspirators who were engaged in the unlawful market manipulation.

Grant of Order

87. For the reasons given above, the conditions for the Court to exercise its jurisdiction under the *Norwich Pharmacal* principle and order disclosure of the Information Sought are amply satisfied. This is an appropriate case for the Court to exercise its discretion to grant an order in the terms of the draft provided.
88. I confirm that Burford will pay the Defendant's reasonable costs of complying with the Order.
89. For completeness, I draw the Court's attention to paragraph 4 of the draft Order which gives permission for Burford to make further applications to the Court. The reason for this is that, notwithstanding the requirement under the LSE Rulebook that orders identify the person or algorithm responsible for an investment decision, it is possible that in some cases the Defendant will only have the identity of the broker or other intermediary who submitted the order to the exchange and not that of the ultimate client. In such cases, it will be necessary for Burford to make a further application for information from the intermediary as to the identity of the underlying client.
90. I also note that the Information Sought may be of interest to Burford's shareholders, who may have claims for loss resulting from the manipulation of Burford's share

price. Burford reserves the right to apply to the Court in the future for permission to share some or all the Information Sought with its shareholders.

I believe that the facts stated in this witness statement are true.

Signed: 
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Richard Charles East

Date: 27 September 2019